

IN THE HIGH COURT OF JUDICATURE AT BOMBAY  
APPELLATE SIDE

CRIMINAL APPEAL NO. 643 OF 2000

The State of Maharashtra  
(Through Nigdi Police Station,  
Pune, District Pune)

... Appellant.  
(Orig.Complainant)

v/s.

1. Sau. Sunita Ramesh Kasabe,  
Age 25 yrs., Occ.Household,  
Residing at Azad Chowk,  
Ota Scheme, Nigdi, Dist.Pune.

2. Sandeep Shivram Mahadik,  
Age 32 yrs., Occ.Service,  
Residing at B/7/8, Sadbhavana  
Society, Krishnanagar,  
Chinchwad, Pune.

... Respondents.  
(Orig.accused  
Nos.1 and 2)

Ms.Usha Kejariwal, Additional Public Prosecutor for  
the State.

Mr.Arfan Sait for respondent No.1.

Mr.Jayesh Kocheta for respondent No.2.

**CORAM : R.M. LODHA AND**  
**R.S. MOHITE, JJ.**

**DATED : 15th/16th February, 2005**

**ORAL JUDGMENT (Per R.M.Lodha, J.)**

On 2nd June, 2000, the 11th Additional Sessions Judge, Pune in Sessions Case No.466 of 1999 acquitted the present respondents of the offence punishable under section 302 of the IPC. The State of Maharashtra aggrieved thereby has approached this court by means of this appeal against the judgment of acquittal.

2. Rupesh (since deceased) and Sunita (present respondent No.1-original accused No.1) developed love for each other. Rupesh though got married to some other woman, he used to visit Sunita

frequently. On 7.7.1999 in the evening Rupesh went to the house of Sunita. Both of them consumed liquor and prepared meals. Thereafter, at about 10.00 p.m. Rupesh went for a walk. After about half an hour Rupesh came back to the house of Sunita and found Sunita and one unknown person in compromising position and having sexual intercourse. Rupesh having questioned the unknown person of what he was being with Sunita, that unknown person slapped Rupesh and pushed him. Sunita and the said unknown person brought one kerosene can and poured the kerosene on the person of Rupesh and one of them ignited match-stick. As a result of this, Rupesh sustained burn injuries. Sunita took Rupesh to his parents' house. Immediately, the ambulance was called and Rupesh was taken to the Sassoon Hospital where he arrived at 00.20 hours (8.7.99) alongwith his relatives. From Sassoon Hospital, an information was sent to Yamuna Nagar Police Chowky that Rupesh is admitted in Sassoon Hospital and he had sustained burn injuries. PSI Chagge who was attached to Yamuna Nagar Police Chowky gave information to PSI Sunil Dadasaheb Ghadge (PW8). Based on the said information, PSI Ghadge arrived at the Sassoon Hospital. After Dr.Prafulla Govind Hirode (PW2) opined that Rupesh was well oriented and conscious, PSI Ghadge took down the report given by Rupesh and based on that, the first information report was

lodge. The requisition was also sent to the Special Judicial Magistrate Mr. Kantilal Rajaram Adasul (PW5). The Special Judicial Magistrate arrived at the hospital at about 5 - 5.30 a.m. (8.7.99) and upon being certified by Dr.Hirode that Rupesh was conscious, well oriented and in a condition to give dying declaration, the Special Judicial Magistrate recorded the dying declaration (Exhibit 26). As already indicated above, on the basis of the report given by Rupesh, the case under section 307 read with section 34 of the IPC was registered and on 8.7.99 Sunita was arrested. During the course of investigation Sandeep Shivram Mahadik (present respondent No.2-original accused No.2) was arrested on 9.7.99. He was identified by Rupesh. Rupesh died on 15.7.99 having 62% of burn injuries. As per the postmortem notes, Rupesh died of shock due to burn injuries. In the light of the death of Rupesh, section 302 was added in the first information report. Upon conclusion of the investigation, PW8 submitted chargesheet in the court of Judicial Magistrate and the accused persons were committed for trial in the Court of Additional Sessions Judge, Pune.

3. The Additional Sessions Judge framed the charge against the accused persons thus-

"THAT, you accused No.1 and 2 on or about 7th day of July, 1999, at 10.30 p.m.

or thereabout, at Azad Chowk Vasahat, W/18,  
Ota Scheme, Nigdi, Pune, Dist-Pune, either  
individually or in furtherance of your  
common intention, did commit murder by  
intentionally or knowingly causing the death  
of Rupesh Narayan Gaikwad by pouring  
kerosene on his person and setting him on  
fire, and thereby committed an offence  
either punishable under section 302 of  
Indian Penal Code simpliciter, or Under  
section 302 read with section 34 of Indian  
Penal Code and within any cognizance.

AND I hereby direct that you be tried  
by me on the aforesaid charge."

4. Both the accused persons pleaded not guilty to  
the charge.

5. In support of its case, the prosecution  
examined Dr.Sudendu Umakant Belsare (PW1), Dr.  
Prafulla Govind Hirode (PW2), Ramesh Wamanrao  
Kasabe (PW3), Narayan Kashinath Gaikwad (PW4),  
Kantilal Rajaram Adasul (PW5), Padmabai Rajani  
Chavan (PW6), Chaya Balu Jadhav (PW7) and Sunil  
Dadasaheb Ghadge (PW8) and also the documentary  
evidence.

6. The incriminating evidence that was produced by  
the prosecution against the accused persons was put  
to them in their statements under section 313  
Cr.P.C.

7. The learned trial Judge considered the evidence  
of the prosecution and interalia held (a) that  
there was discrepancy in the prosecution evidence  
as to whether the report (Exhibit 30) was recorded

first in time or the dying declaration (Exhibit 26) recorded by PW5 was prior to recording of Exhibit 30; (b) that though the prosecution relied upon multiple dying declarations, these were materially inconsistent with each other; (c) that all the statements and the purported dying declarations upon which reliance has been placed by the prosecution were under the influence of liquor as Rupesh had admittedly, consumed alcohol and if that be so, it cannot be said that Rupesh was mentally fit to give his statement and declarations; (d) that Rupesh might have been provoked when he saw Sunita to whom he loved having sexual intercourse with some third person and he might have sprinkled kerosene on his own and ignited match-stick and (e) that the medical history of Rupesh recorded by PW2 at the time of admission in the hospital recorded that Rupesh had sustained suicidal burns.

8. The learned trial Judge, accordingly, acquitted the accused persons.

9. We heard the learned Additional Public Prosecutor and the learned counsel for respondent No.1.

10. For the proper consideration of the multiple dying declarations, we deem it proper to quickly run through the prosecution evidence.

11. Dr.Sudendu Umakant Belsare (PW1) is the Medical Officer, Sassoon Hospital, Pune. On 15.7.99, he was attached to Forensic Department of Sassoon Hospital. He conducted the postmortem examination on the dead body of Rupesh in between 01.30 p.m. to 02.15 p.m. on 15.7.99. The body of Rupesh was found burnt to the extent of 62% No other external injury was found on the body of Rupesh. According to him, the injuries suffered by Rupesh were sufficient to cause death in ordinary course of nature. All burn injuries were ante mortem.

12. Dr.Prafulla Govind Hirode (PW2) is also the Medical Officer in Sassoon Hospital. On 8.7.99, he was attached to Ward No.27 (Burns Ward) of Sassoon Hospital. Rupesh was admitted on 8.7.99 at 00.20 a.m. in Ward No.27. At that time, he was on duty. According to him, Rupesh narrated the history of suicide to him and that was reduced in writing. He treated the patient. On examination, he found Rupesh conscious and well oriented. The police of Nigdi Police Station recorded the statement of Rupesh in his presence. The Special Judicial Magistrate Shri Kantilal Rajaram Adasul (PW5) came to Ward No.27 for the purpose of recording the dying declaration of Rupesh. He also stated that on 8.7.99 at about 5 a.m. Rupesh gave history to

him which he took down. At that time, Rupesh was conscious and well oriented and he stated before him that he was in love with one woman. He got married with the other girl two months back. Rupesh had gone to that woman's house; they prepared food and had drinks; Rupesh went out for some time and when he returned to the house of that lady, he found that lady and one unknown man in bed having sexual intercourse. Both of them poured kerosene and set him on fire. In the cross-examination he , however, admitted that the first dying declaration was recorded by the Magistrate. He also stated in the cross-examination that in between the night of 7.7.99 and 8.7.99, police did not come to him in the Sassoon Hospital and that the police recorded the statement of Rupesh at about 11 p.m. on 8.7.99. He admitted that at the time Rupesh was admitted in the hospital, his relatives were present. In the cross-examination he also admitted that when PW5 came for recording the dying declaration, at that time, the police was with him.

13. Ramesh Wamanrao Kasabe (PW3) is the ex-husband of accused No.1. He deposed that he noticed the illicit relationship between his wife Sunita and Rupesh and therefore, he left Sunita 2 to 2.1/2 years before the date of incident and married one Asha.

14. Narayan Kashinath Gaikwad (PW4) is the father of Rupesh. In his examination-in-chief he stated that on 7.7.99 at about 11.00 p.m. his son Rupesh came. The entire body of Rupesh was burnt. He asked Rupesh as to how he sustained burn injuries and who had burnt you, Rupesh then told him that he had gone to the house of Sunita and the said Sunita had deceived him. Rupesh told him that one person of blackish appearance was present in the house of Sunita. Sunita and that person picked quarrel with him; assaulted him; both the persons sprinkled kerosene on his person; ignited match-stick; set him on fire and ran away. He then immediately called for Ambulance and took Rupesh to Sassoon Hospital. Rupesh was then admitted in Ward No.27. According to him, on 8.7.99, the police officer of Yamuna Nagar Police Chowky as well as the Magistrate came to the hospital and recorded the statements of Rupesh. At the time of recording of the statement by the Magistrate, he and the other members of the family got out of the ward. On 9.7.99, the police brought one person having dark colour to Sassoon Hospital. Rupesh identified that person who picked quarrel with him and set him on fire. The police recorded his statement on 10.7.99. In his cross-examination he was unable to tell the exact time when the police and the Magistrate came to the Sassoon Hospital on 8.7.99

though he stated that it was in the night time. According to him, the distance between the place of incident and his house was approximately 2 and 2.1/2 km. He denied that the accused Sunita brought his son to his house.

15. Kantilal Rajaram Adasul (PW5) is the Special Judicial Magistrate. On 8.7.99 at about 4.30 a.m. ASI Mahadik of Nigdi Police Station went to his house and gave him requisition for recording the dying declaration of Rupesh who was admitted in Sassoon Hospital. Immediately he left for Sassoon Hospital alongwith ASI Mahadik. He asked ASI Mahadik to stop on the ground floor and went to Ward No.27 on the first floor. PW2 examined Rupesh and opined that he was well oriented and conscious. Then he recorded the dying declaration as narrated by Rupesh and read over the same to him. Since both the hands of Rupesh were burnt, he took thumb impression of the left leg. In his cross-examination, he stated that he handed over the dying declaration to ASI Mahadik when he came on the ground floor.

16. Padmabai Rajani Chavan (PW6) and Chaya Balu Jadhav (PW7) are the neighbours of the accused Sunita. Both of them did not support the prosecution case and were declared hostile.

17. Sunil Dadasaheb Ghadge (PW8) is the Police Sub Inspector. On 7.7.99, he was attached to Yamuna Nagar Police Chowky under Nigdi Police Station. On the information received from Sassoon Hospital that one person had sustained 40% burn injuries and is admitted in Sassoon Hospital, he proceeded to the Sassoon Hospital. He went to Ward No.27 and met Rupesh. Rupesh gave him information that was reduced in writing by him. The information (Exhibit 30), according to him, was in his hand-writing. He deposed that after recording the information given by Rupesh, initially, offence punishable under section 307 read with section 34 IPC vide C.R.No.201 of 1999 was registered and he carried the investigation. He arrested accused No.1 Sunita on 8.7.99 and arrested accused No.2 Sandeep on 9.7.99. He recorded the statement of Rupesh on 9.7.99. On 15.7.99, Rupesh died and accordingly, offence punishable under section 302 IPC was added. In his cross-examination, he stated that he reached the Sassoon Hospital on 7.7.99 at 11.45 p.m. He recorded the information given by Rupesh in between 01.00 to 01.30 hours (8.7.99). At that time, none of the relatives of Rupesh was present. However, in the cross-examination he admitted that the information given by Rupesh was reduced in writing by police constable. He admitted that he did not send the burnt pieces of clothes and kerosene tin for chemical analysis and

examination. He also admitted that the Magistrate (PW5) had already reached Sassoon Hospital before he reached there and that the dying declaration of Rupesh was recorded by PW5 before he visited the Sassoon Hospital. He admitted that the dying declaration by PW5 was handed over to the police constable attached to that police station.

18. Having surveyed the evidence now we consider the multiple dying declarations upon which reliance is placed by the prosecution. The evidence aforementioned would show that the prosecution relied upon the five dying declarations. These dying declarations are:

(one) made by Rupesh to his father (PW4) immediately on his reaching the house in burnt condition at about 11.00 p.m. on 7.7.99;

(two) in the nature of medical history narrated by Rupesh to PW2 at the time of admission in the hospital i.e. 00.20 hours on 8.7.99;

(three) in the nature of information (Exhibit 30) given by Rupesh to PW8 in between 01.00 a.m. to 01.30 a.m.(8.7.99) to PW8;

(four) made to Special Executive Magistrate (PW5) between 5.30 a.m. to 5.50 a.m. on 8.7.99 and

(five) in the nature of medical history narrated by Rupesh to PW2 at about 5.50 a.m. on 8.7.99.

19. The oral dying declaration said to have been

made by Rupesh to his father (PW4) does not deserve to be accepted for more than one reason. From the evidence of Special Judicial Magistrate (PW5) it is seen that Rupesh told him that after the incident had occurred, the accused Sunita reached him at the house of his parents. This is what is recorded by PW5 in Exhibit 26 as well. However, PW4 specifically denied that the accused Sunita had brought his son to his house in burnt condition. What seems to us is and that appears to be the consistent case of the prosecution that after the incident had occurred, accused Sunita took Rupesh to his house in burnt condition. If this is the case of the prosecution, it is very difficult to accept the version of PW4 that on 7.7.99 at about 11.00 p.m. his son Rupesh knocked the door saying, "Baba Baba", he opened the door and when he asked him as to how he sustained burn injuries and who had burnt him, Rupesh told him that he had gone to the house of Sunitabai and said Sunitabai had deceived him and she alongwith one more person sprinkled kerosene on his person and ignited match-stick and set him on fire. When Sunita took Rupesh to his house in burnt condition, the very narration of the incident by Rupesh to PW4 creates serious doubt. In that event PW4 would not have let Sunita go back to her house. It is pertinent to note that PW4 accompanied Rupesh and took him to Sassoon Hospital. PW2 recorded the medical history

narrated by Rupesh and that shows that Rupesh sustained burn injuries due to suicide. Last but not the least, until the statement of PW4 was recorded by PW8 on 10.7.99, PW4 had not stated to anyone about the oral dying declaration said to have been made by Rupesh to him. Thus, we find that oral dying declaration said to have been made by Rupesh to his father (PW4) is not free from reasonable doubt.

20. That Rupesh was admitted in Ward No.27 of Sassoon Hospital at 00.20 hours on 8.7.99 is the prosecution case itself. On his admission in the hospital, PW2 who was the Medical Officer attached to Ward No.27 examined Rupesh and took down his medical history. PW2 in his deposition in unambiguous terms stated that the patient (Rupesh) had narrated the history of suicide and thereafter, he treated the patient. The medical notes prepared by PW2 do reflect the suicidal burns on the person of Rupesh. That being the first narration made by Rupesh to PW2 immediately on his admission in the hospital cannot be discarded. That creates considerable doubt about the correctness of the oral dying declaration said to have been made by Rupesh to his father (PW4) as well as the subsequent dying declarations. There is serious discrepancy in the prosecution evidence as to whether PW8 reached the Sassoon Hospital first or

the Special Judicial Magistrate (PW8). PW5 deposed that having got the requisition from ASI Mahadik at about 04.30 a.m. on 8.7.99 for recording the dying declaration of Rupesh, he went with him to Sassoon Hospital and recorded the dying declaration on 8.7.99 between 5.30 a.m. to 5.50 a.m. PW8 in his cross-examination admitted that the Magistrate (PW5) had been to Sassoon Hospital before he reached there and that it was true that the dying declaration of Rupesh was recorded by the Magistrate (PW5) before he visited the Sassoon Hospital. The information (Exhibit 30) on the other hand is said to have been recorded by PW8 as per the narration of Rupesh between 01.00 a.m. to 01.30 a.m. (8.7.99). If PW8 reached Sassoon Hospital after the dying declaration was already recorded by the Magistrate (PW5), obviously, the information (Exhibit 30) could not have been recorded at 01.00 a.m. to 01.30 a.m. This puts a big question mark on the correctness of the information (Exhibit 30) allegedly recorded at 01.00 a.m. to 01.30 a.m. Then there is one more material discrepancy. PW8 in his examination-in-chief states that when he reached Ward No.27, he met Rupesh and the information given by him was reduced into writing by him. He specifically states that "the complaint now shown to me is in my hand writing." However, in his cross-examination, he admitted that the complaint

(Exhibit 30) was reduced into writing by one police constable. Thus, as to who recorded the information (Exhibit 30) is in serious doubt. In this regard, the statement of PW8 is contradictory. The police constable who reduced Exhibit 30 in writing has not been examined by the prosecution. The dying declaration in the form of Exhibit 30, therefore, is not trustworthy.

21. Then comes to the dying declaration said to have been recorded by PW5 on 8.7.99 at about 5.30 to 5.50 a.m. We have already noticed the discrepancy in the deposition of PW5 and PW8. That by itself creates serious doubt about the correctness of dying declaration (Exhibit 26). In his cross-examination, PW5 negated the suggestion that Rupesh was under the influence of drink. The medical documents clearly suggest that Rupesh had consumed the alcohol. As a matter of fact, that is the case of the prosecution itself that when Rupesh went to the house of accused Sunita, both of them consumed liquor. In the cross-examination PW5 also admitted that he did not ask Rupesh whether he was mentally fit to give statement. In the circumstances, a serious doubt is created whether Rupesh was mentally fit to give his statement. The doubt is further strengthened by the fact that when he narrated the history to PW2 at the time of his admission in the Hospital at 00.20 hours, he stated

that he sustained suicidal burns and when PW5 recorded the dying declaration he said that the accused No.1 and one more person sprinkled kerosene on his person and ignited fire. Two different versions on the same night in the backdrop of the fact that he had consumed liquor before the incident had occurred does create suspicion about the mental condition of Rupesh. We, therefore, do not find it safe to rely upon the dying declaration (Exhibit 26) recorded by PW5.

22. Last of the dying declarations is said to have been recorded in the form of medical history by PW2 on 8.7.99 at about 5.50 a.m. For the self-same reason for which dying declaration (Exhibit 26) cannot be accepted, the said dying declaration recorded by PW2 at 5.50 a.m. cannot be acted upon. As already indicated above, there are two different versions given by Rupesh to PW2 in a span of about five hours. Immediately on his admission in the hospital at 00.20 hours on 8.7.99 while narrating the medical history to PW2, Rupesh stated that he sustained suicidal burns while after about five house at 5.50 a.m., PW2 while taking down medical history of Rupesh recorded that the accused No.1 Sunita and one other person sprinkled kerosene on him and set him on fire. We are afraid, such inconsistent versions cannot be safely relied upon.

23. One aspect that needs to be noticed is with regard to the burn injuries sustained by accused Sunita. The medical certificate of accused Sunita indicates that she sustained 2% burn injury in the incident. Superficial burn injury on left side chest and front was 1% and the burn injuries on epigastrius region 1%. There is no explanation at all by the prosecution with regard to the 2% burn injuries sustained by the accused Sunita. Obviously, if the prosecution case is accepted, there was no occasion or reason for Sunita to sustain burn injuries. Rather, it is possible that Rupesh committed suicide and while taking him to his house, Sunita also sustained 2% of burn injuries. Non-explanation of burn injuries on the person of accused Sunita, thus, put suspicion about the prosecution case.

24. The trial court has considered the evidence of the prosecution elaborately and the view taken by it is possible. Even on independent examination of evidence on record, we find that it is not safe to rely upon the dying declarations collectively or individually for the reasons already indicated above to convict the accused-respondents for the offence punishable under section 302 read with section 34 IPC.

25. The appeal does not call for any interference

and is dismissed accordingly.

26. The bond submitted by respondent No.2- Sandeep Shivram Mahadik pursuant to the action under section 390 Cr.P.C. stands cancelled.

27. We are informed by the learned counsel for the present respondent No.1 (original accused No.1) that during the pendency of this appeal, action under section 390 of the Cr.P.C. was taken and since the respondent No.1 was not in a position to furnish personal bond, she is detained in jail. We accordingly, direct that respondent No.1 (original accused No.1- Sou. Sunita Ramesh Kasabe) be released forthwith if not required in any other case.

**(R.M. LODHA, J.)**

**(R.S. MOHITE, J.)**